(10) (8)

Nos. 03-184, 03-1034

Supreme Court, U.S.
FILED
AUG 2 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CLAUDE M. BALLARD, ET UX.,
ESTATE OF BURTON W. KANTER, ET AL.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND ELEVENTH CIRCUITS

BRIEF OF *AMICI CURIAE* SENATOR DAVID PRYOR; THE ESTATE OF ROBERT W. LISLE; AND THE ESTATE OF DONNA M. LISLE IN SUPPORT OF PETITIONERS

RODERICK M. HILLS, JR.
Counsel of Record
UNIVERSITY OF MICHIGAN
SCHOOL OF LAW
437 Hutchins Hall
625 South State Street
Ann Arbor, Michigan 48109
(734) 763-9635

Dated: August 2, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether the Due Process clause of the Fifth Amendment obliges the Tax Court to disclose the findings of the Special Trial Judge, when the Tax Court's rules oblige the trial judge to make such findings and require the Tax Court to presume that these findings are correct.

[This page is intentionally left blank.]

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* ix

INTRODUCTION AND SUMMARY OF ARGUMENT ... 1

ARGUMENT 3

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OBLIGES THE TAX COURT TO DISCLOSE THE SPECIAL TAX JUDGE'S REPORT TO THE PETITIONERS, BECAUSE THESE FINDINGS, BEING PRESUMPTIVELY CORRECT AS A MATTER OF THE TAX COURT'S OWN RULES, CRITICALLY AFFECT THE SUFFICIENCY OF THE PARTIES' EVIDENCE AND BECAUSE THE TAX COURT FACES NO ADMINISTRATIVE BURDEN IN PROVIDING THE REPORT TO PETITIONERS. 3

I. WHEN AN OFFICER'S FINDINGS ARE PRESUMED TO BE CORRECT AS A MATTER OF LAW, THEN THEY MUST BE DISCLOSED TO PARTIES, BECAUSE THEY PLAY A DECISIVE ROLE IN DEFINING THE SUFFICIENCY OF THE PARTIES' EVIDENCE. 5

A. Because the STJ's report is entitled to a presumption of being correct under Rule 183(c), this report is critically important for assessing the sufficiency of the evidence supporting the Tax Court's opinion. 6

B. The Tax Court must disclose the STJ's report as part of its general duty to disclose findings that critically affect the sufficiency of the evidence underlying the Tax Court's decision. 9

C. Because the STJ's report is legally entitled to a presumption of being correct under Rule 183(c), that report is not part of the Tax Court's purely internal deliberations. 16

D. Because the STJ's report is legally entitled to a presumption of being correct under Rule 183(c), that report is distinguishable from the reports of the Division of the Tax Court. 20

II. THE TAX COURT HAS NO LEGITIMATE REASON, SUCH AS AVOIDANCE OF ADMINISTRATIVE BURDEN, FOR REFUSING TO DISCLOSE THE STJ'S REPORT WHEN RULE 183(B) ALREADY REQUIRES THE STJ TO SUBMIT SUCH A REPORT TO THE TAX COURT. 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES:

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 7n

Ballard v. Comm'r, 321 F.3d 1037 (11th Cir. 2003) 10, 11

Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992) 8n-9n

Brock v. L.E. Myers Co., High Voltage Div., 818 F.2d 1270 (6th Cir. 1987) 8n

Carter v. Kubler, 320 U.S. 243 (1943) 10

C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB, 921 F.2d 350 (1st Cir. 1990) 9n

Centre Property Management v. NLRB, 807 F.2d 1264 (5th Cir. 1987) 8n

Chen v. GAO, 821 F.2d 732 (D.C. Cir. 1987) 8n

Chicago Tribune v. NLRB, 974 F.2d 973 (7th Cir. 1992) 8n

Citizens St. Bank v. Federal Deposit Ins. Corp., 718 F.2d 1440 (8th Cir. 1983) 8n

Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971) 16

Cullen v. United States, 194 F.3d 401 (2nd Cir. 1999) 22n

Dickinson v. Zurko, 527 U.S. 150 (1999) 7n

Eastern Engineering & Elevator Co v. NLRB, 637 F.2d 191 (3rd Cir. 1980) 9n

Estate of Kanter v. Comm'r of Internal Revenue, 337 F.3d 833 (7th Cir. 2003) 4n, 5n, 10, 11, 20n

Estate of Lisle v. Commissioner, 341 F.3d 364 (5th Cir. 2003) x

Estate of Varian v. Comm'r of Internal Revenue, 96 F.2d 753 (9th Cir. 1968) 20

Fayerweather v. Ritch, 195 U.S. 276 (1904) 17

Freytag v. Comm'r, 501 U.S. 868 (1991) 19

Goldberg v. Kelly, 397 U.S. 254 (1970) 7

Gonzales v. United States, 348 U.S. 407 (1955) 14, 15, 16, 22

Greene v. McElroy, 360 U.S. 474 (1959) 9-10, 13

Hoffman-LaRoche v. Kleindienst, 464 F.2d 1068 (3rd Cir. 1972) 13

Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1995) 3

ICC v. Louisville & Nashville Ry Co., 227 U.S. 88 (1913) 14

Mathews v. Eldridge, 424 U.S. 319 (1976) 3, 21

Morgan v. United States, 298 U.S. 468 (1936) 18, 19n, 22

Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856) 3

NLRB v. Cooper Union for Advancement of Science and Art, 783 F.2d 29 (2d Cir. 1986) 9n

Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937) 13

Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986) 8n

Reilly v. Pinkus, 338 U.S. 269 (1949) 12

SKS Die Casting & Machining v. NLRB, 941 F.2d 984 (9th Cir. 1991) 8n

Stone v. Commissioner, 865 F.2d 342 (D.C. Cir. 1989) 18

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 6, 7n, 8, 11, 18

United States v. Raddatz, 447 U.S. 667 (1980) 7, 19n

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 7n

Utica Mut. Ins. v. Vincent, 375 F.2d 129 (2nd Cir. 1967) 21, 22, 22n

Willner v. Comm. on Character & Fitness, 376 U.S. 96 (1963) 19

CONSTITUTIONAL PROVISIONS, CODES AND RULES:

United States Constitution
Fifth Amendment ..... i, 3, 4

United States Code
5 U.S.C. §557(c) 4n
26 U.S.C. §7460 20
26 U.S.C. §7482(b)(1)(A) x
28 U.S.C. §636(b)(1)(C) 4n
29 U.S.C. §160(e) 7n

Bankruptcy Rules
Bankr. R. 9033(a) 4n
Bankr. R. 9022 ..... 4n

Tax Court Rules
Rule 161 11
Rule 183(b) 2, 21
Rule 183(c) ..... *passim*

Supreme Court Rules
Rule 37.3 ix
Rule 37.6 ix

MISCELLANEOUS:

Omnibus Taxpayer Bill of Rights,
Pub. L. No. 100-647, §§6226-35,
102 Stat. 3342 ix

Tax Reform Act of 1969, §951, Pub. L. No. 91-172,
83 Stat. 730 ix

115 Cong. Rec. H22809, 91st Cong. 2d Sess.
(Aug 7, 1969) ix

134 Cong. Rec. S15073, S15074, 100th Cong. 2d
Sess. (Oct. 7, 1988) ..... ix-x

134 Cong. Rec. S4134, 100th Cong. 2d Sess.
(April 15, 1988) x

INTERESTS OF *AMICI CURIAE*[1]

Hon. David Pryor served as United States Senator from Arkansas from 1979 to 1996 and as a United States Representative from 1966 to 1973. While in the Senate, Senator Pryor served on the Senate Finance Committee, chairing a subcommittee with responsibility for oversight of the Internal Revenue Service. While in this position, he developed and introduced the first Taxpayer Bill of Rights which was enacted in 1988. *See* Omnibus Taxpayer Bill of Rights, Pub. L. No. 100-647, §§6226-35, 102 Stat. 3342, 3731. As a Member of the House of Representatives, Senator Pryor supported and voted for the Tax Reform Act of 1969, §951, Pub. L. No. 91-172, 83 Stat. 730, which, in order to ensure neutrality and procedural regularity, removed the Tax Court (previously the Board of Tax Appeals) from the Executive Branch and transformed it into an Article I Court. *See* 115 Cong. Rec. H22809, 91st Cong. 2d Sess. (Aug 7, 1969) (roll call vote).

Senator Pryor's actions have been motivated by an abiding belief that taxpayers in the United States have basic rights, including the right to due process of law, a right that is infringed by the proceedings to which the taxpayers here have been subjected. In speaking on the floor of the Senate in support of his landmark 1988 legislation he said "The passage of the taxpayers' bill of rights will send, I think, a very clear message to our country and to all taxpayers, small and large, that taxpayers do in fact have certain basic due process rights ...." 134 Cong. Rec. S15073, S15074, 100th

---

[1] In compliance with Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

Cong. 2d Sess. (Oct. 7, 1988) (statement of Sen. Pryor). "Like any good citizen," he said, "I believe that everyone should pay his or her lawful share of taxes. That is the price of freedom. However, at the same time that we are allowing the IRS to be more intrusive into the lives of our citizens for the sake of compliance, we must also ensure that we maintain basic due process rights, which have eroded slowly but surely over these past two and one-half decades." 134 Cong. Rec. S4134, 100th Cong. 2d Sess. (April 15, 1988) (statement of Sen. Pryor). Senator Pryor seeks to put his views before this Court because of his conclusion that, despite his legislative efforts, the secret procedures now used by the Tax Court and at issue here deprive taxpayers of those basic rights.

Taxpayers Robert and Donna Lisle ("the Lisles") were parties in the Tax Court proceeding under review here. As provided for by 26 U.S.C. §7482(b)(1)(A), because of their legal residence the Lisles' appeal from the adverse decision of the Tax Court was heard by a different Court of Appeals, the United States Court of Appeals for the Fifth Circuit, in a different case than that under review by this Court. *See Estate of Lisle v. Commissioner*, 341 F.3d 364 (5th Cir. 2003). In that case, even despite the unavailability of the Special Trial Judges' report in this case, the Court of Appeals concluded that the credibility and other judgments of the Tax Court were insufficiently supported by the evidence to sustain the finding of fraud against Robert Lisle that formed the basis for most of the tax deficiency and penalties assessed against the Lisles. The Lisles died during the pendency of their appeal. Their estates appear before this Court as *amici curiae* because of the denial of due process that it is now clear was wrought by the routine practice of the Tax Court utilized in the proceeding in which the remaining deficiency against the Lisles — the amount of which remains to be determined on remand in their case — was assessed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case hinges on a principle of procedural transparency so basic that, outside of the Tax Court, it is universally observed by both courts and administrative agencies. This principle is that, if an agency or tribunal relies on a trial judge to hear testimony and, based on that hearing, to make factual findings that enjoy a presumption of being correct, then that agency or tribunal must disclose that judge's recommended findings to the parties whose rights are affected by them. The Tax Court has given special importance to the factual recommendations of the Special Trial Judge ("STJ") by providing in Tax Court Rule 183(c) that "the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Given that the Tax Court has invested the STJ's factual recommendations with a presumption of validity, the Tax Court must disclose those factual recommendations to the parties, because such presumptively valid findings help determine whether there is sufficient evidence underlying the Tax Court's decisions. Thus, the STJ's report has at least the same importance as a potentially decisive piece of evidence. Just as the Tax Court is obliged to disclose evidence on which its decisions rest, so too, the Tax Court is obliged to disclose recommended fact findings that it must presume to be correct.

Because the Tax Court has chosen to invest the factual recommendations contained in the STJ's report with a presumption of validity, those recommended findings cannot be regarded as the purely internal deliberations of the Tax Court. Internal deliberations (*e.g.*, law clerks' memos, staff attorney's recommendations, judge's draft opinions) need not be disclosed, because such deliberations are not legally relevant to the parties' proof or rights and do not limit the tribunal's discretion. The tribunal is, by contrast, not free to ignore completely the STJ's report, because the Tax

Court's own Rule 183(c) requires that this report be accorded a presumption of being correct. By conferring this legal force on the report, the Tax Court has taken it outside the realm of purely internal advice and transformed it into a potentially decisive aspect of the proof.

Disclosure of the STJ's report, therefore, is critically important if the parties are to know whether and to what extent the legal presumptions created by the STJ's report favors or undermines their case. Against this private interest in disclosure, the Tax Court has no legitimate interest in withholding this document from the parties. The Tax Court's Rule 183(b) already requires the STJ to submit such a report to the Tax Court. Therefore, disclosure imposes no additional paperwork or other fiscal or administrative burden on any governmental agency.

The only burden created by disclosure is the burden of transparency. By revealing the presumptively correct statement of facts to the parties and appellate courts, disclosure makes it possible for both to enforce the Tax Court's own rules. But no agency has a legitimate interest in evading appellate review. The Tax Court undoubtedly has broad discretion to structure the mechanisms by which the parties' testimony can be considered. The Tax Court has exercised this discretion by creating a system of hearings before STJs, in which the STJ's findings are presumed correct and "[d]ue regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses." Having chosen such a system for protecting the parties' right to present in-person testimony, the Tax Court cannot then undermine its own rules through a policy of bureaucratic secrecy.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OBLIGES THE TAX COURT TO DISCLOSE THE SPECIAL TAX JUDGE'S REPORT TO THE PETITIONERS, BECAUSE THESE FINDINGS, BEING PRESUMPTIVELY CORRECT AS A MATTER OF THE TAX COURT'S OWN RULES, CRITICALLY AFFECT THE SUFFICIENCY OF THE PARTIES' EVIDENCE AND BECAUSE THE TAX COURT FACES NO ADMINISTRATIVE BURDEN IN PROVIDING THE REPORT TO PETITIONERS.

This Court determines the specific requirements of procedural due process by weighing "the private interest that will be affected by the official action" against "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). No hard and fast rule defines what sorts of procedures are constitutionally required. Instead, this Court performs a context-specific inquiry to determine whether the probable value of additional procedures in preventing an erroneous deprivation of some private interest outweighs the administrative burdens entailed by the procedure. *Id.* In making this *ad hoc* assessment, the Court takes guidance from customary administrative and judicial practices. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1995) (citing decisions for the proposition that "traditional practice provides a touchstone for constitutional analysis" in due process cases). Procedures long in use by a wide array of governmental decision-makers have so withstood the test of time that they cannot be regarded as unduly burdensome. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856) (in defining what due process requires, "we must look to those settled usages and modes of proceeding existing in the

common and statute law of England, before the emigration of our ancestors, *and which are shown not to have been unsuited to their civil and political condition by having been acted on by them* after the settlement of this country") (emphasis added)

Judged by this standard, there can be little doubt that the Fifth Amendment's due process clause requires disclosure of the adjudicative fact-findings of trial judges, administrative law judges, and other initial factfinders *whenever the law invests those findings with the presumption of being correct.* Such disclosure is certainly sanctified by tradition: it has always been virtually the universal practice even in administrative tribunals as well as Article I courts.[2] Two reasons justify a virtually universal practice of disclosure. First, when such fact-findings are invested by the law with a presumption of being correct, then they play a decisive role in determining whether the evidence before the final decision-maker is legally sufficient. Due process forbids keeping a party in the dark about such an essential aspect of the evidence. Second, where statute or regulation already requires an officer to provide written findings, the agency or court that relies on such findings faces no administrative burden whatsoever in disclosing them to the parties governed by them. In short, the cost to the government of disclosure is nil, while the effect of non-disclosure on the parties' capacity to present their proof is extraordinary. Thus, as explained in more detail below, common sense bolsters tradition in requiring disclosure of such findings.

[2] Under section 557 of the Administrative Procedure Act, the reports of hearings officers automatically become part of the administrative record. 5 U.S.C. §557(c). Federal law also requires Article I judges such as federal magistrates and bankruptcy judges to disclose their findings to the parties. 28 U.S.C. §636(b)(1)(C) ("The magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties"); Bankr. R. 9033(a) (In non-core proceedings, "[t]he clerk shall serve forthwith copies [of bankruptcy judge's findings of fact] on all parties by mail and note the date of mailing on the docket"); Bankr. R. 9022 (notice and service of bankruptcy judges' orders and judgments). To counsel's knowledge, the Tax Court's policy of withholding the reports of special trial judges is unique among federal and state agencies and courts. As Judge Cudahy noted in his dissenting opinion, "[e]ven the Commissioner, at oral argument, acknowledged that in every milieu except that of the Tax Court, the document containing the findings or recommendations of the official conducting the trial are available to a court reviewing the operative decision." *Estate of Kanter v. Comm'r*, 337 F.3d 833, 874 (7th Cir. 2003).

The Commissioner maintains that the procedures used by the Tax Court do not violate traditional procedural protections, because tax disputes are not governed by the customs governing common-law courts and because "Tax Court judges need not operate in a manner precisely identical to Article III courts." Brief in Opposition to Certiorari at 17. These statements, however, attack straw men: neither *amici* nor Petitioners argue that the Tax Court is governed by the common law or by Article III. The question is whether the Tax Court complies with the procedural traditions of *any* tribunal, administrative or judicial, Article I or Article III. The answer is obvious: as Judge Cudahy noted, the Tax Court's refusal to disclose the factual recommendations of the STJ is simply unprecedented among any sort of tribunal and wholly at odds even with ordinary administrative practices. *Estate of Kanter*, 337 F.3d at 879 (Cudahy, J., dissenting).

I. WHEN AN OFFICER'S FINDINGS ARE PRESUMED TO BE CORRECT AS A MATTER OF LAW, THEN THEY MUST BE DISCLOSED TO PARTIES, BECAUSE THEY PLAY A DECISIVE ROLE IN DEFINING THE SUFFICIENCY OF THE PARTIES' EVIDENCE.

That disclosure of the STJ's report has enormous practical importance as a procedural safeguard rests on two well-settled principles. First, the STJ's report has at least the same weight as a potentially decisive piece of evidence, because the Tax Court's regulations invest this report with a presumption of being a correct statement of the facts. Tax Ct. R. 183(c). Second, the Tax Court has a duty to disclose to the Petitioners

all documents that have such critical bearing on whether there is sufficient evidence underlying the Tax Court's opinion. The inescapable corollary of these two propositions is that the Tax Court must disclose the contents of the STJ's report, because this report determines the sufficiency of the evidence in this case.

A. Because the STJ's report is entitled to a presumption of being correct under Rule 183(c), this report is critically important for assessing the sufficiency of the evidence supporting the Tax Court's opinion.

When statute or rule commands that a judge's initial fact-findings are presumptively correct, then those findings critically affect the sufficiency of the evidence underlying the final decision-maker's conclusion. This is true even when such findings are recommendations that the final decision-maker is entitled to overturn. As this Court has stated in *Universal Camera*, "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). For this reason, the recommended findings of the trial judge are essential for a complete evaluation of the sufficiency of the evidence before a tribunal like the Tax Court, and such a tribunal must carefully consider such findings even if it ultimately decides to reject them. In *Universal Camera*'s categorical command, "[t]he findings of the examiner *are to*

be considered along with the consistency and inherent probability of testimony." *Id.* (emphasis added).[3]

The judge's initial factual recommendations are especially important when the judge is the only officer who has heard the witnesses' testimony first-hand. In cases where the credibility of the witnesses bears on the decision, the judge's recommended findings provide the ultimate decision-maker with the only mechanism through which to consider such credibility. *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980) ("we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach"); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("Particularly where credibility and

---

[3] Although *Universal Camera* addresses the standard for evaluating whether substantial evidence exists in the record to support an administrative agency's decision, its reasoning applies with equal force to review of the Tax Court's decisions for clear error. As this Court has noted, there are only subtle distinctions between the "clear error" standard and the "substantial evidence" standard. *Dickinson v. Zurko*, 527 U.S. 150, 162-163 (1999). Moreover, *Universal Camera* was rooted in the requirement contained in the Taft-Hartley Act, 61 Stat. 148, 29 U.S.C. §160(e) that the substantiality of the evidence be assessed in light of the "record considered as a whole." *Universal Camera*, 340 U.S. at 493. Likewise, in reviewing a court's fact-finding for "clear error," the reviewing court must consider the "entire evidence" and not merely those portions of the record that favor the trial court's factual conclusions. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) ("'[a] finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court on the *entire evidence* is left with the definite and firm conviction that a mistake has been committed'") (emphasis added). It follows that consideration of the STJ's report is just as essential for determining "clear error" in light of the "entire evidence" as consideration of a hearing officer's findings is for assessing whether "substantial evidence" in the "whole record" underlies an agency's decision.

ity and veracity are at issue ... written submissions are a wholly unsatisfactory basis for decision"). Thus, where credibility is at stake, the reports of the judge who observed such testimony will constitute an especially important part of the record, and *Universal Camera*'s principle that the administrative decision-maker must consider such reports applies with special force. Applying this principle to agency decisions, lower courts are unanimous in holding that the hearing officer's determinations of witnesses' credibility are part of the evidence that must be considered in order to determine whether an agency's decision is supported by substantial evidence.[4] It follows with at

[4] *Chen v. GAO*, 821 F.2d 732, 734 (D.C. Cir. 1987) ("the evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion" and agency reversals of the examiner "are normally scrutinized very carefully to ensure there is some reasoned explanation of the board's disagreement with the decision of the hearing officer"); *Parker v. Bowen*, 788 F.2d 1512, 1520 (11th Cir. 1986) ("We hold that the Appeals Council is not bound by the ALJ's credibility findings, but when it rejects such findings, it should ordinarily do so expressly, articulating the reasons for its conclusion"); *SKS Die Casting & Machining v. NLRB*, 941 F.2d 984, 988-89 (9th Cir. 1991)("The ALJ's contrary findings are one factor that we consider in evaluating whether the Board's findings are supported by substantial evidence"); *Citizens St. Bank v. Federal Deposit Ins. Corp.*, 718 F.2d 1440, 1445 (8th Cir.1983) ("The Board's departure from the ALJ's findings is vulnerable if it fails to reflect attentive consideration to the ALJ's decision"); *Chicago Tribune v. NLRB*, 974 F.2d 973, 935 (7th Cir. 1992) ("an administrative law judge's determinations of credibility are entitled to a certain weight by a reviewing court, because he sees and hears the witnesses and the Board has only a transcript of their testimony"); *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270 (6th Cir. 1987) (requiring Occupational Safety and Health Review Commission to articulate reasons for failing to credit findings of an ALJ who had a unique opportunity to observe demeanor of witnesses); *Centre Property Management v. NLRB*, 807 F.2d 1264 (5th Cir. 1987) (applying "more searching" scrutiny to board's findings where they conflict with ALJs); *Blackburn v. Martin*, 982 F.2d 125, 128 (4th

least equal force that, when reviewing the entire evidence to determine whether the Tax Court committed "clear error" in its findings of fact, the STJ's assessment of credibility must be considered.

B. The Tax Court must disclose the STJ's report as part of its general duty to disclose findings that critically affect the sufficiency of the evidence underlying the Tax Court's decision.

Given the authority that Rule 183(c) confers on the STJ's report, this report must be disclosed to the Petitioners, because this report critically affects whether sufficient evidence underlies the Tax Court's opinion. The Tax Court is obliged by its own rules to take the STJ's report into consideration, because, according to Rule 183(c), this report must be presumed to be correct. It is a "relatively immutable [principle] in our jurisprudence" that "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496-497

Cir. 1992) ("In conducting our review, we consider the entire record before us, including the ALJ's recommendation and any evidence that is contrary to the Secretary's determination"); *Eastern Engineering & Elevator Co v. NLRB*, 637 F.2d 191, 197 (3rd Cir. 1980) (NLRB's factual findings are overturned where NLRB "failed to accord due weight to the ALJ's findings of fact," because NLRB "was required to extend some, but not absolute, deference to the ALJ's determinations" on credibility of witnesses); *NLRB v. Cooper Union for Advancement of Science and Art*, 783 F.2d 29, 31 n.2 (2d Cir. 1986) ("We recognize that when the Board makes findings inconsistent with the ALJ, as here, the findings are more open to question than if the Board and the ALJ had reached the same result, but only if the evidence turns on the credibility of the witnesses"); *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 355 (1st Cir. 1990) ("In cases such as this one, however, where the Board has reached a conclusion opposite of that of the ALJ, our review is slightly less deferential than it would be otherwise").

(1959). *See also Carter v. Kubler*, 320 U.S. 243, 247 (1943) ("The basic elements of such a [fair and full] hearing include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence"). It follows *a fortiori* that the STJ's report must also be disclosed, given the legal force with which the Tax Court has invested the STJ's report through Rule 183(c), because the findings of the STJ's report will affect the sufficiency of the evidence supporting the Tax Court's opinion. If the STJ's report is inconsistent with the Tax Court's view of the facts, then this inconsistency will weaken the evidentiary underpinning of the Tax Court's opinion and, where the evidence is otherwise close, suggest that the Tax Court committed clear error. Thus, the Tax Court can no more conceal the STJ's report from the Petitioners than it can conceal evidence that would affect judicial assessment of the evidentiary basis for the Tax Court's decision.

The importance of the STJ's report is especially great in this case because of the centrality of credibility evaluations to the Tax Court's finding of fraud. The Tax Court found that there was clear and convincing evidence that Burton Kanter was motivated by fraudulent intent in his alleged underpayment of taxes. Without disclosing what the STJ's report found concerning Kanter's testimony, the Tax Court's opinion relied, in part, on "the lack of credibility of Kanter's testimony." *Estate of Kanter v. Comm'r of Internal Revenue*, 337 F.3d 833, 846 (7th Cir. 2003). But this finding would be critically weakened if the STJ's report found that Kanter's testimony on his intentions was credible. Likewise, the Tax Court found that Ballard had committed tax fraud in part based on "Ballard's false and misleading testimony to the Tax Court." *Ballard v. Comm'r*, 321 F.3d 1037, 1043 (11th Cir. 2003). However, Ballard did not present testimony to "the Tax Court" but rather to the STJ. If the

STJ's report, presumed correct under Rule 183(c), had found that Ballard's testimony was neither false nor misleading, then this finding would severely undermine the evidentiary basis for the Tax Court's finding." In the words of *Universal Camera*, the evidence of fraud would become "less substantial" because "an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the [Tax Court's]." *Universal Camera*, 340 U.S. at 496. That the finding of fraudulent intent hinged on the undisclosed contents of that report is indicated by both the Seventh Circuit's and the Eleventh Circuit's opinions below, both of which upheld the Tax Court's finding of clear and convincing evidence of fraudulent intent in reliance on the Tax Court's assurance that the Tax Court's finding was consistent with the STJ's report. *Estate of Kanter*, 337 F.3d at 847. *Ballard v. Comm'r*, 321 F.3d at 1042 (relying on "critical fact" that the record as presented to us clearly reveals that the report adopted by the Tax Court is Special Trial Judge Couvillion's report").

Therefore, it was essential for Petitioners to know exactly what the STJ's report found concerning Kanter's and Ballard's intent in order to focus effectively their argument before the Tax Court and the Seventh and Eleventh Circuits. Under the Tax Court's rules, the Petitioners were permitted to file a post-trial motion for reconsideration of findings. Tax Ct. R. 161. But absent disclosure of the STJ's report, it was impossible for the Petitioners to discover and invoke any inconsistency between the STJ's report and the Tax Court's opinion as a basis for such a motion. In effect, by concealing the contents of the STJ's report, the Tax Court concealed from the Petitioners potentially decisive evidence that the Tax Court was legally obliged to consider as part of its decision-making process.

This Court has held that it is "illogical" for an administrative agency to deny a party the opportunity to

show that the expert opinions on which the agency relies are contradicted by other evidence. *Reilly v. Pinkus*, 338 U.S. 269, 275-76 (1949) ("It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books"). It is even more irrational for an Article I court to bar a party from having an opportunity to contradict the Tax Court's findings with the STJ's report. Unlike the medical dictionaries excluded from the evidence in *Reilly*, the STJ's report is not merely just one more piece of evidence. Rather, it is the legally authoritative statement of findings by the only judge to hear the testimony in this case, findings that the Tax Court was obliged by its own rules to presume correct and, at the very least, to consider carefully before rejecting them. Excluding such a report from the record even though the Tax Court was legally obliged to consider the report is tantamount to barring potentially decisive evidence from the record even though the court actually considered such evidence in reaching its decision.

In response to these concerns, the Tax Court assures the Petitioners and this Court that its own opinion gave appropriate regard to the STJ's report.[5] But this assertion confuses substance with procedure. The issue before this Court is not the substantive one of whether the Tax Court's opinion was supported by sufficient evidence and, therefore, should be affirmed on the merits. Rather the issue is the procedural

[5] As proof of this assertion, the Tax Court notes that the STJ signed a declaration endorsing the Tax Court's opinion. Such a declaration, of course, shows only that the STJ endorsed the Tax Court's opinion, not that the STJ's report provided support for that opinion. Rule 183(c) invests only the latter with a presumption of being correct. That the STJ might have changed his mind after consulting with the Tax Court judges is, from an evidentiary point of view, irrelevant.

question of whether the Petitioners and the reviewing court of appeals received a fair opportunity to make an independent evaluation of the sufficiency of the evidence underlying the Tax Court's opinion. The Due Process clause requires that the Petitioners be given "the evidence used to prove the Government's case" so that the Petitioners "have an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959). It is, of course, possible that the STJ's report supports the Tax Court's opinion in every respect. (If so, it is curious that the Tax Court refuses to release this report to Petitioners and the appellate courts). Regardless, this is a possibility that the Petitioners, the Seventh Circuit, the Eleventh Circuit, and, indeed, this Court are incapable of evaluating until the STJ's report is disclosed. *See Hoffman-LaRoche v. Kleindienst*, 464 F.2d 1068, 1072 (3rd Cir. 1972) (Requiring disclosure of advisory committee's report on which FDA's decision was based and noting that "[w]e cannot tell whether the failure to produce the Advisory Committee's report and its supporting documents was or was not prejudicial to Hoffmann until we examine them").

The Tax Court can no more support its decision by asserting that it had properly deferred to the undisclosed STJ's report than it could support its decision by referring to undisclosed testimony that allegedly supported the decision. *See Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292, 303-04 (1937)(Deprivation of due process where Commission altered valuation of property relying on the "the strength of information secretly collected and never yet disclosed," because appellate court could not "intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable"). The Petitioners, like any other private party, is entitled to see the evidence for themselves and not rely on the Tax Court's *ipse dixit* that the STJ's report somehow supports — or does not under-

mine — the Tax Court's conclusions. As Justice Holmes observed ninety-one years ago, "[a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. ... for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding." *ICC v. Louisville & Nashville Ry Co.*, 227 U.S. 88, 93 (1913).

The Tax Court's duty to disclose critical pieces of evidence and documents affecting the weight of such evidence is illustrated by this Court's decision in *Gonzales v. United States*, 348 U.S. 407 (1955). *Gonzales* held that a person seeking an exemption from military conscription as a conscientious objector was entitled to a copy of the Department of Justice's report to the Draft Appeals Board recommending that the exemption be denied. In rejecting the view that the Appeals Board could withhold the report, the Court noted that "our underlying concepts of procedural regularity and basic fair play" required that "a copy of the recommendation of the Department be furnished the registrant at the time it is forwarded to the Appeal Board, and that he be afforded an opportunity to reply." *Gonzales*, 348 U.S. at 412. The Court rejected the notion that the Appeals Board could withhold the report because it was "advisory," observing that precisely because the Appeals Board was "the only decision-making body to pass on the entire file," Gonzales needed to have the opportunity to reply to the Department of Justice's report in order to "insur[e] that this Board will have all of the relevant data." According to the *Gonzales* Court, "if the registrant is to present his case effectively to the Appeal Board, he must be cognizant of all the facts before the

Board as well as the over-all position of the Department of Justice." *Gonzales*, 348 U.S. at 413.

As with *Gonzales*, the relevant federal decisionmaker in this case has been supplied with a report summarizing the results of an investigation and making factual recommendations. Just as Gonzales could not effectively present his case before the Appeals Board without knowing about the contents of the Department of Justice's report, so too, the Petitioners could not effectively present their case to the Tax Court without knowing the factual recommendations of the STJ. The trial before the STJ produced a voluminous record with over 5,000 pages of transcript, almost 5,000 pages of briefs, and thousands of exhibits. Faced with this undigested mass of evidence, the Petitioners could not be expected to focus its briefing and argument on the critical evidence — namely, those pieces of evidence that formed the basis of the STJ's report. The STJ's report would critically undermine certain legal theories and bolster others, by investing some witnesses' statements with a presumption of truth and other witnesses' statements with a presumption of falsity. Without knowing which witnesses were regarded by the STJ as credible, the Petitioners were incapable of showing to either the Tax Court itself in a post-trial motion or to the Seventh or Eleventh Circuits that the Tax Court committed clear error in light of the presumptively correct view of the facts. In effect, the Petitioners were denied the possibility of arguing that the Tax Court had failed to credit the presumptions that governed the evidence, because the Petitioners did not know how the STJ's report credited the evidence.

The Due Process clause forbids a tribunal from forcing the Petitioners to litigate in the dark, ignorant of the presumptions that govern the proof. Just as Gonzales "was entitled to know the thrust of the Department [of Justice]'s recommendation so he could muster his facts and arguments to meet its conten-

tions," *Gonzales* at 414, the Petitioners were entitled to know the recommendations of the STJ's report so that it could tailor its arguments before the Tax Court and the appellate courts to that report's presumptively correct view of the facts. There is no question but that *Gonzales* applies to the reports of hearings officers as well as advisory investigative reports. *See, e.g., Crotty v. Kelly*, 443 F.2d 214, 216-17 (1st Cir. 1971) (draft registrant seeking status as conscientious objector is entitled to copy of hearing officer's report, because otherwise registrant "could not effectively present his position to the Board"). Indeed, *Gonzales* applies with even greater force to the fact-findings of trial judges when those findings are invested with the legal status of being the presumptively correct view of the facts. The Selective Service Appeals Board in *Gonzales* was under no legal obligation to defer to the FBI report. By contrast, the Tax Court is legally obliged to defer to the STJ's findings on credibility.

C. Because the STJ's report is legally entitled to a presumption of being correct under Rule 183(c), that report is not part of the Tax Court's purely internal deliberations.

The Commissioner argues that the STJ's report was simply part of the internal process by which judges deliberate among themselves and, therefore, is immune from disclosure. Apparently drawing an analogy between draft judicial opinions and the STJ report, the Commissioner notes that "communications between the judges (and special trial judges) to whom a case is assigned for disposition are not produced or disclosed to the parties." Commissioner's Brief in Opposition to Cert., at 9.

This assertion, however, ignores the legal authority of the STJ's report. That report was not a purely internal communication between judges but rather the

officially sanctioned, legally required, and presumptively correct statement of findings by the trial judge. As the official statement of the judge's findings, it bore no resemblance to confidential judicial deliberations. Such internal deliberations have no legally operative effect on the parties or the tribunal itself. Therefore, disclosure of such documents to the parties would serve no purpose except to embarrass the tribunal with a judge's preliminary and perhaps tentative thoughts on a case. Thus, it is not surprising that courts universally hold that such deliberations should not be disclosed to the parties and that the tribunal's official opinion, not evidence of the judge's behind-the-scenes thought-processes, should determine the meaning and scope of the tribunal's decisions. *See, e.g., Fayerweather v. Ritch*, 195 U.S. 276, 306-07 (1904) (preclusive effect of trial judge's opinion determined by normal rules of *res judicata* rather than judge's later testimony of what he subjectively considered).

By contrast, under Rule 183(c), the STJ's report has at least some legal force and cannot be disregarded by the Tax Court at will: the Tax Court is legally bound to pay "due regard" to the report's evaluations of witnesses' credibility and generally accept the report's findings as presumptively correct. This report, therefore, is wholly unlike preliminary judicial discussions that have no legal effect on judicial discretion (*e.g.*, a draft of a judicial opinion, a law clerk's bench memo, or a staff attorney's recommendation), because the STJ's report constrains the Tax Court's discretion, if only in the sense that the Tax Court cannot ignore that report altogether. Disclosure of this legally constraining document is essential if the parties are to know the presumptions that govern the proof that they have submitted.

For the purpose of distinguishing the STJ's report from judges' internal deliberations, the precise level of deference owed by the Tax Court to the STJ's findings

is immaterial. Whether or not the Tax Court must uphold the STJ's findings absent clear error, as the D.C. Circuit has held, *Stone v. Commissioner*, 865 F.2d 342, 346-47 (D.C. Cir. 1989), it is indisputable that Rule 183(c) requires that "the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Under the Tax Court's own rules, therefore, the STJ's report constrains the Tax Court's discretion to some degree. This rule follows the doctrine universally adopted by this and all lower courts that the findings of the officer who actually heard the testimony is, at the very least, highly relevant to the question of that testimony's credibility and thus to the question of whether an agency's decision is supported by substantial evidence. *Universal Camera*, 340 U.S. at 496; n.2 *supra*. Whatever the precise level of deference due to the STJ's report, it is beyond dispute that the Tax Court owes *some* deference to that report, if Rule 183(c) has any meaning whatsoever. Any such deference suffices to destroy any analogy between the report and purely internal judicial deliberations that can have no effect on the legal sufficiency of the evidence.

Rule 183(c)'s requirement of at least some minimal deference to STJ's report is not merely a technicality. Rather, it is the regulatory embodiment of an important due process requirement — namely, the requirement that the findings of the judge who actually hears the testimony will receive careful consideration by the ultimate decision-maker on the issue of the witnesses' credibility. Absent such careful consideration, the parties' oral presentation of evidence, their "day in court," becomes a meaningless exercise. Due process does not permit the ultimate decision-maker to dispense so cavalierly with consideration of the parties' own oral testimony, at least in the context of a traditional adjudication of a private individual's liberty or property interests. *Morgan v. United States*, 298 U.S. 468, 481 (1936)("If the one who determines the facts

which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given").[6]

The trial before the STJ was a traditional adjudication by an Article I judge of an individual's property rights. *Freytag v. Comm'r*, 501 U.S. 868, 881-82 (1991) (Special trial judges function as traditional judges in that they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders"). As with the hearing before any other trial judge, the hearing before the STJ was the parties' only opportunity to present in-person their version of events in a court of law. When a trial judge presides over the only venue in which the parties' in-person testimony can be heard, then the findings of that judge cannot be regarded as purely internal advice that the agency can withhold from the parties. *Cf. Willner v. Comm. on Character & Fitness*, 376 U.S. 96, 104 (1963) (rejecting the view that the Committee on Character & Fitness "is an investigator not a trier of facts" on the ground "the Appellate Division has held no hearings of its own to determine an applicant's character," indicating that "the role of the Committee is more than that of a mere investigator").

---

[6] Whatever the force of *Morgan*'s famous statement that "[t]he one who decides must hear" in administrative decision-making, *Morgan*, 298 U.S. at 481, it has greater force in the context of adjudications an individual's property or liberty interests. *See United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980) ("we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach").

D. Because the STJ's report is legally entitled to a presumption of being correct under Rule 183(c), that report is distinguishable from the reports of the Division of the Tax Court.

The legal status of the STJ's report also distinguishes it from the reports of the divisions of the Tax Court. Unlike the reports of the STJs, no rule of the Tax Court requires that the reports of the divisions of the Tax Court shall be presumed to be correct. Not surprisingly, 26 U.S.C. §7460 provides that this non-binding document "shall not be a part of the record in any case in which the chief judge directs that such report shall be reviewed by the Tax Court." Having no legally constraining effect on either the Tax Court or the parties, the Due Process clause does not require the disclosure of the division's reports. *Estate of Varian v. Comm'r of Internal Revenue*, 96 F.2d 753, 755 n.2 (9th Cir. 1968) (holding that report of division of Tax Court need not be disclosed). The non-disclosure of such non-binding decisions of the Division, however, do not suggest that the reports of the STJ can similarly be withheld. Unlike the division's reports, the STJ's reports are invested with the legal presumption of being correct. It is plausible that the Tax Court distinguished between the reports of the division and the STJ in this manner because, unlike the division judge who could append his or her findings to a dissenting opinion, the STJ has no mechanism for publishing its differing view of the evidence if the Tax Court were to reject the STJ's findings.[7] But regardless of the justification for the difference in the Tax Court's treatment of the reports of the division

[7] As Judge Cudahy noted, "the STJs are not equal to the Tax Court judges and it might be naive to assume that the STJs have an equal voice in the collaborative process that results in Tax Court opinions." *Estate of Kanter*, 337 F.3d at 887 (Cudahy, J., dissenting).

and the STJ, the Tax Court does, in fact, treat the latter but not the former as presumptively correct. Having seen fit to confer such a legal status on the STJ's initial report, the Tax Court cannot then withhold such a critical document from the parties.

II. THE TAX COURT HAS NO LEGITIMATE REASON, SUCH AS AVOIDANCE OF ADMINISTRATIVE BURDEN, FOR REFUSING TO DISCLOSE THE STJ'S REPORT WHEN RULE 183(B) ALREADY REQUIRES THE STJ TO SUBMIT SUCH A REPORT TO THE TAX COURT.

Disclosure of the STJ's report would be virtually costless to the government. Indeed, the Commissioner has never described any burden that could result from such disclosure. The Petitioners do not ask the STJ to generate a new or different report, with the attendant delay and cost that such a task might entail. They ask only that the Tax Court simply disclose a report that already exists and is already required by the Tax Court's regulations. Rule 183(b) of the Tax Court's Rules of Practice and Procedure already require that "the Special Trial Judge shall submit a report, including findings of fact and opinion, to the Chief Judge [of the Tax Court]." Requiring that this already-existing report be disclosed imposes no significant "fiscal and administrative burdens" on the Tax Court. *Mathews v. Eldridge*, 424 U.S. at 348 (noting that "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed").

The Commissioner's brief in opposition to certiorari cites decisions holding that agencies are not always constitutionally required to create written fact-findings. *See* SG Brief in Opposition to cert., at 10 (citing *Utica Mut. Ins. v. Vincent*, 375 F.2d 129, 131 (2nd Cir. 1967)). But these cases are irrelevant to the

issue here. As this Court noted in *Gonzales v. United States*, 348 U.S. 407, 412 n.4 (1955), decisions addressing whether "a recommendation or intermediate report is necessary to begin with" are "inapplicable" to the distinct question of whether an agency must merely disclose a report that is already required by regulation or statute. It is, perhaps, arguable that, at least for certain sorts of "legislative" policy-making, an agency can reach a decision based on a paper record without even a written report of findings from the officer who actually heard the witnesses' testimony. *See Utica Mut. Ins. v. Vincent*, 375 F.2d 129 (2nd Cir. 1967).[8] But where a tribunal itself declares in its own rules that it will rely on a written report of a trial judge, then it defies common sense to say that the tribunal will somehow suffer some administrative burden if the report which the tribunal already possesses is disclosed to the parties.

Courts undoubtedly need some discretion to define for themselves how they will evaluate evidence. *Morgan v. United States*, 298 U.S. 468, 481 (1936) ("Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical"). However, once the agency has exer-

[8] As Judge Friendly emphasized in *Utica Mutual Insurance*, a hearing on whether a bargaining unit should be certified does not require trial-type procedures, because the nature of the underlying issue is more legislative than adjudicative, *Utica Mut. Ins.*, 375 F.2d at 132-33, and because "Utica has no 'property right' in the designation of the unit of its employees with which it may be required to bargain, even though the National Labor Relations Act entitles it to be heard thereon." *Id.* at 134. Where a tribunal adjudicates an individual's private rights, the failure of the tribunal to consider the report of the officer who actually heard the testimony raises more troubling issues of due process. *See, e.g., Cullen v. United States*, 194 F.3d 401, 406 (2nd Cir. 1999) (district judge may not reject magistrate's credibility judgments without having heard live witnesses, as this practice raises "troubling questions of constitutional due process.").

cised this discretion by giving a trial judge the power to make presumptively correct findings of fact, then that agency is estopped from saying that further disclosure of those findings is somehow unnecessary or impractical.

Indeed, the only apparent burden of disclosing the STJ's report is the burden of being forced to justify any discrepancies that might exist between the report of the STJ and Tax Court's opinion. But this is simply the normal burden of appellate review to insure that a decision is supported by sufficient evidence. Like any other court, the Tax Court has no legitimate interest in making such appellate review more difficult by making the evidentiary basis for its decision less transparent.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

RODERICK M. HILLS, JR.
Counsel of Record
UNIVERSITY OF MICHIGAN
SCHOOL OF LAW
437 Hutchins Hall
625 South State Street
Ann Arbor, Michigan 48109
(734) 763-9635

Dated: August 2, 2004